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Supreme Court, U. S.
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FEB 28 1974

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY, a Division of Knight Newspapers, Inc., *Appellant*

v.

PAT L. TORNILLO, JR., *Appellee*

On Appeal from the Supreme Court of Florida

BRIEF OF AMICUS CURIAE, THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

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PRELIMINARY STATEMENT

The American Newspaper Publishers Association submits this brief as amicus curiae in support of the Appellant and urges that this Court reverse the decision of the Supreme Court of Florida entered below. The written consents of the Appellant and Appellee to the filing of this brief have been filed with the Clerk of this Court. The American Newspaper Publishers

Association with the consent of the parties also filed a brief amicus curiae in support of Appellant's Jurisdictional Statement.

INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association (hereinafter referred to as "ANPA" or the "Association") is a nonprofit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of 1100 daily newspapers, representing over ninety percent of the total daily and Sunday newspaper circulation in the United States. Although some of the largest newspapers in the country hold membership in the ANPA and although some ANPA member newspapers may have "regional and international"[1] circulation, it should be noted that more than fifty percent of the Association's members have daily newspaper circulation of less than 25,000 and seventy-five percent of the Association members have daily newspaper circulation of less than 50,000. The Miami Herald Publishing Company and twenty-six other newspapers located throughout the State of Florida hold membership in the ANPA.

To the knowledge of your amicus, this case represents the first litigation involving the issue of constitutionality of a state statute requiring a newspaper to publish, free of charge, a response to charges against any candidate for nomination or election. For this reason, the decision below will have major impact, not only upon newspapers in the State of Florida, but also upon newspapers throughout the United States where similar statutes may exist or be enacted. Because of

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[1] Opinion of the Supreme Court of Florida, Appendix to Appellant's Brief, p. 23, 287 So.2d 78.

this impact, your amicus desires to present to this Court its views on behalf of its members in regard to the constitutionality and legality of the State of Florida Statutes, § 104.38.

ARGUMENT

A. This Court Has Jurisdiction Under 28 U.S.C. § 1257 To Review the Decision of the Supreme Court of Florida in This Appeal.

Your amicus supports and adopts the argument of the Appellant in connection with this Court's jurisdiction to review the decision of the Supreme Court of Florida in this matter. It is clear that the decision of the Florida Supreme Court on the constitutionality of § 104.38, Florida Statutes, meets the finality requirement of 28 U.S.C. § 1257.

As recently as December 5, 1973, this Court had occasion to discuss the finality requirement of 28 U.S.C. § 1257 in *North Dakota Pharmacy Board* v. *Snyder's Drug Stores, Inc.*, — U.S. —, 38 L.Ed.2d 379, 94 S.Ct. — (1973). Although that case came before the Court on certiorari under 28 U.S.C. § 1257(3), and the present case involves an appeal under 28 U.S.C. § 1257(2), this is a distinction without a difference as it relates to that statute. In *Snyder's,* the State Supreme Court remanded for a further administrative proceedings after it determined that the state statute involved was constitutional. In that case, this Court was met with the respondent's argument that because of the remand by the state court, the U. S. Supreme Court had no jurisdiction to review the state court decision on the constitutional issues. Relying upon *Mills* v. *Alabama,* 384 U.S. 214 (1966), and *Hudson Distributors, Inc.* v. *Eli Lilly and Co.,* 377 U.S.

386 (1964), this Court found the decision of the North Dakota Supreme Court to be final and appealable. Further, the Court reaffirmed Mr. Justice Frankfurter's point that the concept of finality has a "penumbral area". Here, for all practical purposes, the Florida Supreme Court has finally decided the constitutional issue presented by the Appellant. It held that there was no constitutional barrier preventing the enforcement through civil litigation of the Florida criminal statute dealing with the right of a candidate for office to reply to newspaper columns assailing that candidate's personal character or charging that candidate with malfeasance or misfeasance in office, or otherwise "attacking" that candidate's official record. If this Court denies review at this point, the Appellant, as in *Snyder's,* has no constitutional barrier to the enforcement of § 104.38, of the Florida Statutes. To deny review of this matter on this appeal would "result in a completely unnecessary waste of time and energy in judicial systems already troubled by delay due to congested dockets". *Mills* v. *Alabama, supra,* p. 217-218. Your amicus respectfully suggests that the finality requirement of 28 U.S.C. § 1257 has been satisfied and that the decision of the Supreme Court of Florida on the constitutional issue is ripe for review.

B. Florida Statutes, § 104.38 Is an Unconstitutional Abridgement of the Freedom of the Press.

The Appellee was a candidate for a state office who demanded that the appellant print verbatim his response to two editorials which allegedly attacked the appellee's personal character.

The trial court concluded that the Florida Statutes, § 104.38 was an unconstitutional restraint upon freedom of speech and press. The Florida Supreme Court,

in a decision contrary to the trial court, determined that the statute in question enhanced, rather than abridged, the First and Fourteenth Amendments to the Constitution of the United States.

Your amicus respectfully submits that the Florida statute in question is clearly unconstitutional and that it, permitted to stand, formulates a devastating inroad upon the freedom of the press guaranteed by the First Amendment. Not only does the statute compel a newspaper to print editorial material with which it does not agree, but also it indirectly and subtly must surely have a stifling effect upon a newspaper's editorial freedom when it can be anticipated that a reply of unknown comment to the editorial must be published, free of cost, with equal dignity accorded the original editorial.

The Supreme Court of Florida for the most part erroneously based its opinion upon a case dealing with the electronic media, *Red Lion Broadcasting Co., Inc.* v. *FCC,* 395 U.S. 367 (1969), in which this Court upheld the constitutionality of the FCC "fairness doctrine" and found that it did not violate the First Amendment guarantees of freedom of speech and press. It is clear, however, from a reading of *Red Lion* that this Court did not intend its words to be applied to the private press of this country. The issues and holding in that case relate only to the regulation of the broadcast medium, which is a medium not open to all and one which by the very genesis of its electronic being is subject to governmental control. The problem in *Red Lion* as seen by this Court was a possibility of station owners and a few networks having within their power as private interests the ability to censor the free exchange of information in the broadcast medium. Certainly, no extensive argument is required to con-

vince this Court that *Red Lion* does not constitute precedent for permitting the State of Florida to dictate to a free press when, where and what it will publish in its daily newspapers.

Further, the Court below relied upon this Court's decision in *Associated Press* v. *U.S.*, 326 U.S. 1 (1945), in reaching its decision. Again, its reliance is clearly misplaced. *Associated Press* concerned monopolistic practices and only stands for the proposition that the business of operating a newspaper, like other businesses, is subject to usual business regulation, including regulation under applicable antitrust laws. It appears that the Court below in relying so heavily upon *Red Lion* and *Associated Press* believed that those cases supported its theory that, since daily newspapers and chain newspapers have become so large, they tend to in some way improperly or illegally monopolize the dissemination of news. As this Court can clearly see from the Interest of the Amicus section set out on page two of this brief, the membership statistics of this amicus demonstrate that the lower court's concern with the size and concentration of the press is unfounded. Those statistics show that above all the majority of the members of this amicus are local, community businesses. Not only are the lower court's concerns relating to size and concentration of the press medium unfounded, but also it is submitted that the thrust of this Court's decisions in *Red Lion* and *Associated Press* does not relate to size and concentration of the press, but declares that a free press not only prohibits governmental interference but also prohibits interference with the exercise of a free press by private interests. In other words, private interests cannot conspire to interfere with another's right of freedom of the press.

In this case no one is conspiring, or in any way attempting, to intrude upon or to repress Appellee's exercise of his constitutional guarantee of a free press or his constitutional guarantee to express in any manner his views on political issues. The "right" Appellee is, in fact, asserting is a "right" given to him by the State of Florida under Section 104.38 of its statutes.

Although the Court below indicates that it recognizes that *Red Lion* is perhaps in some way distinguishable as a case dealing with the broadcast medium, the Court below believed that the law as enunciated by this Court concerning regulation of the broadcast medium was clearly applicable to, and controlling on, the print medium. For instance, in its opinion the Court below stated that *Red Lion* was applicable to the facts of the case before it since it could take judicial notice of the fact that publishers of newspapers rely upon the gathering and dissemination of news transmitted over telegraph wire or air waves to and from news-gathering bodies and newspapers. Without further comment on the logic of this reasoning, suffice it to say that your amicus does not contest for a moment that telegraph wires and air waves are subject to regulation and may be regulated. However, this is a function separate and apart from Appellee's exercise of its guarantee of freedom to utilize the medium of the printed word.

It would appear that the Court below has in some way decided that since competition is rapidly vanishing in the business of the publication of daily newspapers and that the trend is toward the concentration of ownership of mass media, including newspapers, the Florida statute in question here is justified because it permits the individual candidate

for office, who does not own or have unlimited access to a daily metropolitan newspaper, a right to express his views on equal terms with that of the large newspaper owner. In other words, the Court below has indicated that the First Amendment guarantee to a free press must somehow be adjusted to eliminate the inequitable disparity in the ability of a large newspaper to publish or exercise its freedom of press and ability of an individual candidate for office to exercise his freedom of the press. This is precisely that type of frightening logic often espoused to the effect that an individual's Fourth Amendment right to be free from an unreasonable search and seizure should be abrogated by the courts when the effect of upholding that right allows a guilty man to go free. In other words, even if the free and fair exercise of constitutional guarantees may result in inequities or injustices, the overall benefit to society must suffer in the long run if this Court does not enforce those guarantees on a uniform and impartial basis.

The Supreme Court of Florida in this case has adopted the untenable position that the press is only one-half free unless others have access to that press to express an opposing view on matters of political and public concern. Similar arguments were rejected in the *Chicago Joint Board, Amal. Cloth. Workers* v. *Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971), wherein a newspaper refused to publish advertisements submitted to it by a union purporting to present the union's view in a labor dispute. The Court of Appeals, in rejecting the union's contentions, stated:

> "The Union's right to free speech does not give it the right to make use of the defendants' printing presses and distribution systems without defendants' consent." 435 F.2d 478.

Similarly, this issue was faced in the case of *Associates & Aldrich Co.* v. *Times Mirror Co.,* 440 F.2d 133 (9th Cir. 1971), wherein the Court stated at p. 135:

> "Appellant has not convinced us that the Courts or any other governmental agency should dictate the contents of a newspaper."

The issue presented in this case is fundamental. The struggle for liberty has historically been a struggle against government. The Founding Fathers in their collective wisdom sought to prevent the curtailment of freedom of religion, press, assembly and speech. "Madison and the other Framers of the First Amendment, able men they were, wrote in language they earnestly believed could never be misunderstood: 'Congress shall make no law . . . abridging the freedom . . . of the press . . .' Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints." *New York Times* v. *United States,* 403 U.S. 713, 716-17 (1971).

As recent as July 13, 1973, the Supreme Judicial Court of Massachusetts issued an opinion concerning proposed legislation in that state which would require a newspaper accepting a paid political advertisement for one group to accept for publication a paid political advertisement advocating a contrary view. The Court in its opinion considered not only the rationale of the so-called "fairness doctrine" upheld in *Red Lion, supra,* but also the proposition that the intent of the statute was to foster the expression of all views in the public interest. The Massachusetts Court concluded

that the statute was unconstitutional and that, paradoxically, a result opposite from the one desired would be achieved. Further, the Court held that combating alleged media concentration would in no way justify the abridgment of First Amendment rights. *Opinion of the Justices,* 298 N.E. 2d 829 (Mass. 1973).

If the legislature can dictate to the press what it must print in the public interest regarding candidates for election, it follows that freedom of expression shall not long be a right retained by the people but a limited privilege exercised under the color of public interest by whoever acts with the authority of government.

Justice Stewart, in a concurring opinion in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* — U.S. —, 36 L.Ed. 2d 772, 807-08 (1973), stated:

> "There is never a paucity of arguments in favor of limiting the freedom of the press. The Court of Appeals concluded that greater government control of press freedom is acceptable here because of the scarcity of frequencies for broadcasting. But there are many more broadcasting stations than there are daily newspapers. And it would require no great ingenuity to argue that newspapers too are Government. After all, newspapers get Government mail subsidies and a limited antitrust immunity. The reasoning of the Court of Appeals would then lead to the conclusion that the First Amendment requires that newspapers too be compelled to open their pages to all comers.
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> * * * * *

> "Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that 'fairness' was far too fragile to be left for a government bureaucracy to accomplish. History has many times confirmed the wisdom of their choice."

Your amicus is ever mindful of the potential influence of the press and is dedicated to the proposition that a free and open society requires the widest dissemination of all ideas and positions from as many different sources as possible if our society is to remain free. Inherent in a truly free press, however, is the unfettered right to criticize or to advocate. For every publisher who may express a critical view, there are others who will express an opposing view.

It is respectfully submitted that the application of the Florida statute to the Appellant herein presents to this Court the most substantial and clear-cut violation of the constitutional guarantee of a free press that this Court has ever been called upon to review. If the decision of the Florida Court is sustained, freedom of the press as explicitly guaranteed by the Constitution shall soon perish and be replaced by administrative fiat.

CONCLUSION

In conclusion, it is respectfully urged that this Court reverse the decision of the Supreme Court of Florida which upheld the constitutionality of Florida Statutes, § 104.38 and in so doing, reaffirm that the Framers of the First Amendment to the Constitution did not intend that the several states should have the power to

so intimidate persons exercising their First Amendment right to a free press.

Respectfully submitted,

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